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AMENDED IN ASSEMBLY MAY 24, 2013
AMENDED IN ASSEMBLY APRIL 11, 2013
CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 263

Introduced by Assembly Member Roger Hernández

February 7, 2013

An act to amend Sections 98.6, 1102.5, and 1103 of, to add Section 1024.6 to, and to add Chapter 3.1 (commencing with Section 1019) to Part 3 of Division 2 of, the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 263, as amended, Roger Hernández. Employment: retaliation: immigration-related practices.

Existing law prohibits an employer from discharging an employee or in any manner discriminating against any employee or applicant for employment because the employee or applicant has engaged in prescribed protected conduct relating to the enforcement of the employee's or applicant's rights. Existing law provides that an employee who made a bona fide complaint, and was consequently discharged or otherwise suffered an adverse action, is entitled to reinstatement and reimbursement for lost wages. Existing law makes it a misdemeanor for an employer to willfully refuse to reinstate or otherwise restore an employee who is determined by a specified procedure to be eligible for reinstatement.

This bill would also prohibit an employer from retaliating or taking adverse action against any employee or applicant for employment because the employee or applicant has engaged in protected conduct.

The bill would provide that an employee who was retaliated against or otherwise was subjected to an adverse action is entitled to reinstatement and reimbursement for lost wages. The bill would subject a person who violates these provisions to a civil penalty of up to \$10,000 per violation. The bill would also provide that it is not necessary to exhaust administrative remedies or procedures in the enforcement of these provisions. Because the willful refusal by an employer to reinstate or reimburse an employee who suffered a retaliatory action under these provisions would be a misdemeanor, the bill would expand the scope of a crime and impose a state-mandated local program.

Existing law declares that an individual who has applied for employment, or who is or has been employed in this state, is entitled to the protections, rights, and remedies available under state law, regardless of his or her immigration status. Existing law declares that an inquiry into a person's immigration status for purposes of enforcing state labor and employment laws shall not be permitted, unless a showing is made, by clear and convincing evidence, that the inquiry is necessary in order to comply with federal immigration law.

This bill would make it unlawful for an employer or any other person to engage in, or direct another person to engage in, an unfair immigration-related practice, as defined, against a person for the purpose of, or with the intent of, retaliating against any person for exercising a right protected under state labor and employment laws or under a local ordinance applicable to employees, as specified. The bill would also create a rebuttable presumption that an adverse action taken within 90 days of the exercising of a protected right is committed for the purpose of, or with the intent of, retaliation.

The bill would authorize a civil action by an employee or other person who is the subject of an unfair immigration-related practice, and would ~~require~~ *authorize* a court to order the appropriate government agencies to suspend for 14 days the business license, as defined, of a person who violates these provisions for a first ~~violation~~, *violation*. *The bill would require a court to order the appropriate government agencies to suspend for 30 or 90 days that license for a 2nd or 3rd violation, respectively, and to permanently revoke that license for a 4th violation or if the court establishes a pattern or practice of willful violations, as specified.* The bill would authorize a person who prevails in an action pursuant to these provisions to recover reasonable attorney's fees and costs.

Existing law prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from

disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. Existing law further prohibits an employer from retaliating against an employee for that disclosure. Under existing law, a violation of these provisions by the employer is a misdemeanor. Existing law additionally subjects an employer that is a corporation or a limited liability company to a civil penalty not exceeding \$10,000 for each violation of these provisions.

This bill would additionally prohibit any person or entity from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, as provided, and would prohibit any person or entity from retaliating against an employee for that disclosure. This bill would provide that any person or entity that violates these provisions is guilty of a misdemeanor, and would further subject an entity that violates these provisions that is a corporation or limited liability company to a civil penalty of not exceeding \$10,000 for each violation of these provisions. By expanding the scope of a crime, this bill would impose a state-mandated local program.

Existing law prohibits an employer or prospective employer, with the exception of certain financial institutions, from obtaining a consumer credit report, as defined, for employment purposes unless it is for a specified position, including, among others, a position in the state Department of Justice, a managerial position, as defined, or a position that involves regular access to \$10,000 or more of cash, as specified.

This bill would prohibit an employer from discharging an employee or in any manner discriminating, retaliating, or taking any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) Wage theft is a serious and widespread problem that causes
4 severe hardship to low-wage workers, their families, and their
5 communities.

6 (b) When a worker is denied wages or forced to work “off the
7 clock,” there is an immediate and irreparable harm to the worker
8 and his or her family.

9 (c) Low-wage, often immigrant, workers are the most frequent
10 victims of wage theft and are also exposed to the greatest hazards
11 at work.

12 (d) Immigrant workers have the greatest number of work-related
13 injuries and fatalities.

14 (e) Far too often, when workers come forward to expose unfair,
15 unsafe, or illegal conditions, they face retaliation from the
16 employer.

17 (f) Where there are immigrant workers involved, employer
18 retaliation often involves threats to contact law enforcement
19 agencies, including immigration enforcement agencies, if a worker
20 engages in protected conduct.

21 (g) No employee should have to fear adverse action, whether it
22 involves threats to cut hours, move a worker to night shift, or
23 contact law enforcement agencies, simply for engaging in rights
24 the State of California has deemed so important that they are
25 protected by law.

26 (h) It is in the public policy interest of the State of California
27 that workers be able to report concerns to their employers without
28 fear of retaliation or discrimination.

29 (i) It is in the public policy interest of the State of California
30 for workers to be willing to come forward to expose hazardous,
31 unsafe, and unfair conditions at their worksites so that local, state,
32 and federal agencies can effectively enforce the laws.

33 (j) It is essential to the enforcement of this state’s labor laws
34 that we have broad, clear, and effective protections for workers
35 engaging in conduct protected by law from all forms of employer
36 retaliation, including prohibiting immigration-related threats.

37 SEC. 2. Section 98.6 of the Labor Code is amended to read:

1 98.6. (a) A person may not discharge an employee or in any
2 manner discriminate, retaliate, or take any adverse action against
3 any employee or applicant for employment because the employee
4 or applicant engaged in any conduct delineated in this chapter,
5 including the conduct described in subdivision (k) of Section 96,
6 and Chapter 5 (commencing with Section 1101) of Part 3 of
7 Division 2, or because the employee or applicant for employment
8 has filed a bona fide complaint or claim or instituted or caused to
9 be instituted any proceeding under or relating to his or her rights,
10 which are under the jurisdiction of the Labor Commissioner, or
11 because the employee has initiated any action or notice pursuant
12 to Section 2699, or has testified or is about to testify in a
13 proceeding pursuant to that section, or because of the exercise by
14 the employee or applicant for employment on behalf of himself,
15 herself, or others of any rights afforded him or her.

16 (b) (1) Any employee who is discharged, threatened with
17 discharge, demoted, suspended, retaliated against, subjected to an
18 adverse action, or in any other manner discriminated against in
19 the terms and conditions of his or her employment because the
20 employee engaged in any conduct delineated in this chapter,
21 including the conduct described in subdivision (k) of Section 96,
22 and Chapter 5 (commencing with Section 1101) of Part 3 of
23 Division 2, or because the employee has made a bona fide
24 complaint or claim to the division pursuant to this part, or because
25 the employee has initiated any action or notice pursuant to Section
26 2699 shall be entitled to reinstatement and reimbursement for lost
27 wages and work benefits caused by those acts of the employer.

28 (2) An employer who willfully refuses to hire, promote, or
29 otherwise restore an employee or former employee who has been
30 determined to be eligible for rehiring or promotion by a grievance
31 procedure, arbitration, or hearing authorized by law, is guilty of a
32 misdemeanor.

33 (3) In addition to other remedies available, an employer who
34 violates this section is liable for a civil penalty not exceeding ten
35 thousand dollars (\$10,000) per employee for each violation of this
36 section.

37 (4) In the enforcement of this section, there is no requirement
38 that an individual exhaust administrative remedies or procedures.

39 (c) (1) Any applicant for employment who is refused
40 employment, who is not selected for a training program leading

1 to employment, or who in any other manner is discriminated
2 against in the terms and conditions of any offer of employment
3 because the applicant engaged in any conduct delineated in this
4 chapter, including the conduct described in subdivision (k) of
5 Section 96, and Chapter 5 (commencing with Section 1101) of
6 Part 3 of Division 2, or because the applicant has made a bona fide
7 complaint or claim to the division pursuant to this part, or because
8 the employee has initiated any action or notice pursuant to Section
9 2699 shall be entitled to employment and reimbursement for lost
10 wages and work benefits caused by the acts of the prospective
11 employer.

12 (2) This subdivision shall not be construed to invalidate any
13 collective bargaining agreement that requires an applicant for a
14 position that is subject to the collective bargaining agreement to
15 sign a contract that protects either or both of the following as
16 specified in subparagraphs (A) and (B), nor shall this subdivision
17 be construed to invalidate any employer requirement of an
18 applicant for a position that is not subject to a collective bargaining
19 agreement to sign an employment contract that protects either or
20 both of the following:

21 (A) An employer against any conduct that is actually in direct
22 conflict with the essential enterprise-related interests of the
23 employer and where breach of that contract would actually
24 constitute a material and substantial disruption of the employer's
25 operation.

26 (B) A firefighter against any disease that is presumed to arise
27 in the course and scope of employment, by limiting his or her
28 consumption of tobacco products on and off the job.

29 (d) The provisions of this section creating new actions or
30 remedies that are effective on January 1, 2002, to employees or
31 applicants for employment do not apply to any state or local law
32 enforcement agency, any religious association or corporation
33 specified in subdivision (d) of Section 12926 of the Government
34 Code, except as provided in Section 12926.2 of the Government
35 Code, or any person described in Section 1070 of the Evidence
36 Code.

37 SEC. 3. Chapter 3.1 (commencing with Section 1019) is added
38 to Part 3 of Division 2 of the Labor Code, to read:

CHAPTER 3.1. UNFAIR IMMIGRATION-RELATED PRACTICES

1019. (a) It shall be unlawful for an employer or any other person or entity to engage in, or to direct another person or entity to engage in, unfair immigration-related practices against any person for the purpose of, or with the intent of, retaliating against any person for exercising any right protected under this code or by any local ordinance applicable to employees. Exercising a right protected by this code or local ordinance includes, but is not limited to, the following:

(1) Filing a complaint or informing any person of an employer's or other party's alleged violation of this code or local ordinance, so long as the complaint or disclosure is made in good faith.

(2) Seeking information regarding whether an employer or other party is in compliance with this code or local ordinance.

(3) Informing a person of his or her potential rights and remedies under this code or local ordinance, and assisting him or her in asserting those rights.

(b) (1) As used in this chapter, "unfair immigration-related practice" means any of the following practices, when undertaken for the retaliatory purposes prohibited by subdivision (a):

(A) Requesting more or different documents than are required under Section 1324a(b) of Title 8 of the United States Code, or a refusal to honor documents tendered pursuant to that section that on their face reasonably appear to be genuine.

(B) Using the federal E-Verify system to check the employment authorization status of a person at a time or in a manner not required under Section 1324a(b) of Title 8 of the United States Code, or not authorized under any memorandum of understanding governing the use of the federal E-Verify system.

(C) Threatening to file or the filing of a false police report.

(D) Threatening to contact or contacting immigration authorities.

(2) "Unfair immigration-related practice" does not include conduct undertaken at the express and specific direction or request of the federal government.

(c) Engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of rights protected under this code or local ordinance applicable to employees shall raise a rebuttable presumption of having done so in retaliation for the exercise of those rights.

(d) (1) An employee or other person who is the subject of an unfair immigration-related practice prohibited by this section, or a representative of that employee or person, may bring a civil action for equitable relief and any damages or penalties, in accordance with this section.

(2) Upon a finding by a court of applicable jurisdiction of a violation this section:

(A) For a first violation, the court ~~shall~~ *may, in the court's discretion*, order the appropriate government agencies to suspend all licenses subject to this chapter that are held by the violating party for a period of 14 days. For the purposes of this paragraph, the licenses that are subject to suspension are all licenses held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred. If the violating party does not hold a license specific to the business location or locations where the unfair immigration-related practice occurred, but a license is necessary to operate the violating party's business in general, the licenses that are subject to suspension under this subdivision are all licenses that are held by the violating party at the violating party's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall suspend the licenses according to the court's order.

(B) For a second violation, the court shall order the appropriate government agencies to suspend for a period of 30 days all licenses that are held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred. If the violating party does not hold a license specific to the business location or locations where the unfair immigration-related practice occurred, but a license is necessary to operate the violating party's business in general, the court shall order the appropriate agencies to suspend for a period of 30 days all licenses that are held by the violating party at the violating party's primary place of business. On receipt of the court's order and notwithstanding any other law, the appropriate agencies shall immediately suspend the licenses.

(C) For a third violation, the court shall order the appropriate government agencies to suspend for a period of 90 days all licenses that are held by the violating party specific to the business location or locations where the unfair immigration-related practice occurred. If the violating party does not hold a license specific to the business

1 location or locations where the unfair immigration-related practice
2 occurred, but a license is necessary to operate the violating party's
3 business in general, the court shall order the appropriate agencies
4 to suspend for a period of 90 days all licenses that are held by the
5 violating party at the violating party's primary place of business.
6 On receipt of the court's order and notwithstanding any other law,
7 the appropriate agencies shall immediately suspend the licenses.

8 (D) For a fourth violation, or if the court establishes a pattern
9 or practice of willful violations, the court shall order the appropriate
10 government agencies to permanently revoke all licenses that are
11 held by the violating party specific to the business location or
12 locations where the unfair immigration-related practice occurred.
13 If the violating party does not hold a license specific to the business
14 location or locations where the unfair immigration-related practice
15 occurred, but a license is necessary to operate the violating party's
16 business in general, the court shall order the appropriate agencies
17 to permanently revoke all licenses that are held by the violating
18 party at the violating party's primary place of business. On receipt
19 of the court's order and notwithstanding any other law, the
20 appropriate agencies shall immediately revoke the licenses.

21 (3) An employee or other person who is the subject of an unfair
22 immigration-document practice prohibited by this section, and
23 who prevails in an action authorized by this section, shall recover
24 its reasonable attorney's fees and costs, including any expert
25 witness costs.

26 (e) (1) As used in this chapter, "license" means any agency
27 permit, certificate, approval, registration, charter, or similar form
28 of authorization that is required by law and that is issued by any
29 agency for the purposes of operating a business in this state,
30 including any of the following:

31 (A) Articles of incorporation.

32 (B) Certificate of partnership, partnership registration, or articles
33 of organization.

34 (C) Transaction privilege tax license.

35 (2) As used in this chapter, "license" does not include a
36 professional license.

37 1019.1. The provisions of this chapter are severable. If any
38 provision of this chapter or its application is held invalid, that
39 invalidity shall not affect other provisions or applications that can
40 be given effect without the invalid provision or application.

1 SEC. 4. Section 1024.6 is added to the Labor Code, to read:

2 1024.6. An employer may not discharge an employee or in any
3 manner discriminate, retaliate, or take any adverse action against
4 an employee because the employee updates or attempts to update
5 his or her personal information, unless the changes are directly
6 related to the skill set, qualifications, or knowledge required for
7 the job.

8 SEC. 5. Section 1102.5 of the Labor Code is amended to read:

9 1102.5. (a) An employer or any other person or entity may
10 not make, adopt, or enforce any rule, regulation, or policy
11 preventing an employee from disclosing information to a
12 government or law enforcement agency, where the employee has
13 reasonable cause to believe that the information discloses a
14 violation of state or federal statute, or a violation or noncompliance
15 with a state or federal rule or regulation.

16 (b) An employer or any other person or entity may not retaliate
17 against an employee for disclosing information to a government
18 or law enforcement agency, where the employee has reasonable
19 cause to believe that the information discloses a violation of state
20 or federal statute, or a violation or noncompliance with a state or
21 federal rule or regulation.

22 (c) An employer or any other person or entity may not retaliate
23 against an employee for refusing to participate in an activity that
24 would result in a violation of state or federal statute, or a violation
25 or noncompliance with a state or federal rule or regulation.

26 (d) An employer or any other person or entity may not retaliate
27 against an employee for having exercised his or her rights under
28 subdivision (a), (b), or (c) in any former employment.

29 (e) A report made by an employee of a government agency to
30 his or her employer is a disclosure of information to a government
31 or law enforcement agency pursuant to subdivisions (a) and (b).

32 (f) In addition to other penalties, an employer or other entity
33 that is a corporation or limited liability company is liable for a
34 civil penalty not exceeding ten thousand dollars (\$10,000) for each
35 violation of this section.

36 (g) This section does not apply to rules, regulations, or policies
37 which implement, or to actions by employers against employees
38 who violate, the confidentiality of the lawyer-client privilege of
39 Article 3 (commencing with Section 950), the physician-patient

1 privilege of Article 6 (commencing with Section 990) of Chapter
2 4 of Division 8 of the Evidence Code, or trade secret information.

3 SEC. 6. Section 1103 of the Labor Code is amended to read:

4 1103. An employer or any other person or entity that violates
5 this chapter is guilty of a misdemeanor punishable, in the case of
6 an individual, by imprisonment in the county jail not to exceed
7 one year or a fine not to exceed one thousand dollars (\$1,000) or
8 both that fine and imprisonment, or, in the case of a corporation,
9 by a fine not to exceed five thousand dollars (\$5,000).

10 SEC. 7. No reimbursement is required by this act pursuant to
11 Section 6 of Article XIII B of the California Constitution because
12 the only costs that may be incurred by a local agency or school
13 district will be incurred because this act creates a new crime or
14 infraction, eliminates a crime or infraction, or changes the penalty
15 for a crime or infraction, within the meaning of Section 17556 of
16 the Government Code, or changes the definition of a crime within
17 the meaning of Section 6 of Article XIII B of the California
18 Constitution.